PROSKAUER ROSE LLP
MARK THEODORE (SBN 187538)
mtheodore@proskauer.com
TRACEY L. SILVER (SBN 287745)
tsilver@proskauer.com
2049 Century Park East, 32nd Floor
Los Angeles, CA 90067-3206
Telephone: (310) 557-2900
Facsimile: (310) 557-2193

Attorneys for Respondent,
BODEGA LATINA CORPORATION D/B/A EL SUPER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM M. PATE, Acting Regional Director of Region 21 of the National Labor Relations Board, for, and on behalf of, the NATIONAL LABOR RELATIONS BOARD Petitioner, v. BODEGA LATINA CORPORATION D/B/A/ EL SUPER, Respondent.	Case No. 2:15-cv-04228-GHK-AGR **RESPONDENT BODEGA LATINA CORPORATION D/B/A/ EL SUPER'S OPPOSITION TO PETITIONER'S EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME FOR THE COURT TO HEAR THE MOTION SEEKING LEAVE TO AMEND THE CORRECTEED PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT** Judge: Hon. George H. King Courtroom: 650 Los Angeles, Roybal

I. INTRODUCTION

One month after rushing into Court to initiate injunctive relief proceedings, Petitioner's attempts to correct its papers and clarify exactly what it is it seeks continue. First, Petitioner moved for 10(j) injunctive relief on a seemingly *ex parte* basis, an effort this Court summarily rejected because it was "unclear why the [Petitioner] did not seek relief by filing a properly-noticed Petition more than a month ago." (ECF No. 8.) Then, Petitioner misfiled the notice associated with its corrected Petition, which the Court eventually accepted as filed nonetheless. (ECF Nos. 10, 20, 22.) Now, Petitioner files an *ex parte* application to shorten the time within which to hear a motion to amend its Petition. The proposed amendment explains that what Petitioner desires is not urgent reinstatement of alleged discriminatee Fermin Rodriguez, but some but some type of "offer" of reinstatement to take effect ***10 weeks after*** this Court orders it. (ECF Nos. 28, 30-33.) Needless to say, this makes a mockery of and is entirely inconsistent with the very concept of injunctive relief, which is to redress ***imminent*** irreparable harm.

As we show below, the application should be denied for two fundamental reasons: (1) Petitioner has failed to show that it will be irreparably prejudiced if the underlying motion is heard according to regularly noticed motion procedures; (2) Petitioner has failed to show that it is without fault in creating the need for *ex parte* relief. *See Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995) (cited with approval in *Eichenlaub v. Baca*, No. CV 06 6979 GHK, 2007 WL 809676, at *1 (C.D. Cal. Mar. 6, 2007) (King, J.)).

II. ARGUMENT

The Central District has recognized that "*[e]x parte* motions" of the type at issue here "are inherently unfair" and "rarely justified," and that their "abus[e] . . . is detrimental to the administration of justice and . . . present ever-increasing problems for the parties, their lawyers, and for the court." *Mission Power Eng'g*, 883 F. Supp. at 489-90. For these reasons, *ex parte* applications are highly disfavored. Among other things, they "contravene the structure and spirit of the Federal Rules of Civil Procedure and the Local Rules of this court," both of which "contemplate that ***noticed*** motions should be the rule and not the exception." *In re Intermagnetics Am., Inc.* 101 B.R. 191, 193 (Bankr. C.D. Cal. 1989) (emphasis original) (footnote omitted). Ex parte applications

> throw the system out of whack. They impose an unnecessary administrative burden on the court and an unnecessary adversarial burden on opposing counsel who are required to make a hurried response under pressure, usually for no good reason. They demand priority consideration, when such consideration is seldom deserved . . . .

Id. It is thus well settled that filing an ex parte application "is the forensic equivalent of standing in a crowded theater and shouting, 'Fire!'" *Mission Power Eng'g*, 883 F. Supp. at 492. Accordingly, "[t]here had better be a fire." *Id.* Quite simply, "*[e]x parte* applications are not intended to save the day for parties who have failed to present requests when they should have . . . ." ." *In re Intermagnetics Am., Inc.* 101 B.R. at 193.

To warrant the extraordinary relief sought through *ex parte* applications, the movant must show, first, that its "cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures. Second it must be established that the moving party is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable

neglect." *Mission Power Eng'g*, 883 F. Supp. at 492. Here, Petitioner can establish neither.

A. Petitioner Has Failed to Demonstrate Irreparable Prejudice

Petitioner fails to show why its cause would be "irreparably prejudiced" if the motion to amend is "heard according to the regular noticed procedures." *Mission Power Eng'g*, 883 F. Supp. at 492. As the Central District has explained:

> [t]o show irreparable prejudice, it [is] usually necessary to refer to the merits of the accompanying proposed motion, because if it is meritless, the failure to hear it cannot be prejudicial. A sliding scale is used to measure the threat of prejudice. If the threatened prejudice would not be severe, then it must be apparent that the underlying motion has a high likelihood of success on the merits. If drastic harm is threatened, then it is sufficient to show that there are close issues that justify the court's review before the party suffers the harm.

Id. at 492-93. Not only is there *no* threat of prejudice here, but Petitioner's motion to amend is highly likely to, and should, fail on the merits.

Petitioner seeks to amend a Petition for injunctive relief that was filed a month ago, and that is premised on claims which have been known for much longer and which are encompassed in a final complaint issued back on April 24, 2015. There is absolutely no reason or threat of prejudice explaining why the hearing on this effort to amend and Respondent's ability to oppose it must now be rushed to all take place within a matter of two weeks. Certainly, Petitioner does not identify any.

In an apparent allusion to such a threat, Petitioner notes that its *ex parte* application is "consistent with the statutory priority for injunction proceedings" and the "recognition that the need for interim injunctive relief requires expedition in [§] 10(j) proceedings." (ECF No. 31, at p. 2). Incredibly, however, Petitioner

makes no effort to reconcile this statement with its course of conduct, which includes a one month delay in seeking to amend its papers, or with the nature of the amendment it seeks to make—a 10 week deferral in the implementation of injunctive relief ordered by this Court (if "just and proper" reason for it were found), a concept entirely inconsistent with the type of speedy intervention envisioned by § 10(j) and with the necessary showing of extraordinary, *imminent* harm that would occur if injunctive relief were not granted.

For these very reasons, Petitioner's motion to amend should fail on the merits. "The Ninth Circuit has identified four factors to consider in determining the propriety of a motion for leave to amend: '(1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party.'" *Walker v. Benter*, 41 F. Supp. 2d 1067, 1070 (C.D. Cal. 1999) (quoting *Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping Indus. of So. Calif.*, 648 F.2d 1252, 1254 (9th Cir. 1981)). Here, there is ample undue delay and zero attempt to justify it. Nowhere in its papers does Petitioner explain why it seeks to amend its Petition a month after its filing. Nor does Petitioner explain why this Court should automatically conclude that the motion to amend is made in good faith. Notably, Petitioner does not even as much as mention what "issues" surrounding Rodriguez's reinstatement it would attempt to address during the 10 weeks during which this Court's order would be deferred. (ECF No. 28 at p. 1.)

Further, the proposed amendment and the timeline within which Petitioner seeks to make it would be highly prejudicial. Although Petitioner goes to great lengths to characterize the amendment it seeks to make as a "simple and small" "change to the remedy" requested "while everything else in the . . . Petition remains the same," (ECF No. 28 at 1; ECF No. 32 at 2), the proposed amendment goes to the ***very merits*** of the Petition—namely, Petitioner's heavy burden to demonstrate that exigent harm would ensue if the injunctive remedy sought were not granted, and that the balance of hardships tips in favor of granting such

remedy. Respondent has already filed opposing papers addressing the inappropriateness of the injunctive remedy *initially* requested, based on both of these considerations. For this reason alone, Respondent would be prejudiced by the amendment. To permit the amendment without affording Respondent an adequate opportunity to address the newly requested relief by supplementing its opposition to the Petition would only worsen that prejudice. This is especially the case here, as the novel nature of the relief now requested greatly impacts the governing analysis, particularly as to the issue of imminent and irreparable harm. Any opportunity to respond would certainly be inadequate if Petitioner's reply to the motion to amend would be due only four days before a hearing on ***both*** the merits of the Petition ***and*** the motion to amend. Based on the evidence submitted in response to its Petition for Injunctive Relief, Petitioner has had many months to investigate and prepare the Petition and inform this Court and Respondent of exactly what it is that the Petition seeks, and why. Yet, in the name of feigned urgency, Petitioner now wishes to limit Respondent's ability to prepare and adequately respond not only to the motion to amend the Petition, ***but also to the Petition itself***. Accordingly, Respondent would be gravely prejudiced.[1]

Further, the proposed amendment would be futile, as it would result in the Petitioner's seeking a "deferred" remedy, which is entirely inconsistent with the very concept of injunctive relief—to redress ***imminent*** irreparable harm. Accordingly, a Petition requesting that this Court act immediately and in an extraordinary fashion but issue order which will only take effect 10 weeks into the future would, and should, be denied.

[1] Notably, this timeline would also burden the Court and would significantly "detract[] from a fundamental purpose of the adversary system, namely, to give the court the best possible presentation of the merits and demerits of the case on each side." *Mission Power*, 883 F. Supp. at 491.

B. Petitioner Is At Fault For Creating the Unnecessary Need for *Ex Parte* Relief

Petitioner cannot possibly demonstrate that it is without fault in creating the "crisis" that necessitates ex parte relief because its suddenly-discovered need to amend its Petition is the sole cause for this Application. Nor can Petitioner show that its neglect in failing to bring the Application sooner is excusable. In fact, quite remarkably, ***nowhere*** in either its Application or supporting Memorandum does Petitioner present ***any*** explanation of what occurred, and when, that now requires ex parte relief.[2] If, as is the case, this Court has previously rejected "bald and unsupported assertions" to demonstrate irreparable harm, *Frontline Med. Assocs., Inc. v. Coventry Healthcare Workers Comp., Inc.*, 620 F. Supp. 2d 1109, 1111 (C.D. Cal. 2009) (King, J.), then it follows that ***no*** explanation at all cannot possibly support the granting of an ex parte application. *See, e.g., AT&T Intellectual Prop. II, L.P. v. Toll Free Yellow Pages Corp.*, No. CV 09-9707 PSG, 2009 WL 4723613, at *1 (C.D. Cal. Dec. 2, 2009) (denying ex parte application where moving party "did not even attempt to demonstrate" irreparable prejudice and where crisis that precipitated the application was of the moving party's "own making . . . .")

III. CONCLUSION

There simply is no basis for granting Petitioner's *ex parte* application. Indeed, considering that what Petitioner seeks is to ***defer*** the relief sought from this Court by as much as 10 weeks from the date of any order issued after the July 20 hearing on the Petition, there is no reason why the Petition should not be heard until after Respondent has had an opportunity to answer the motion to amend in due course, or, perhaps even more appropriately, at the time that the imminent injunctive relief sought can be instituted.

[2] Indeed, contrary to usual practice, Petitioner fails to submit a supporting declaration, providing the needed detailed factual support for its Application.

For all the foregoing reasons, the *ex parte* Application should be denied.

DATED: July 7, 2015

Respectfully submitted,

PROSKAUER ROSE LLP

MARK THEODORE
TRACEY L. SILVER

By: /s/ Mark Theodore
Mark Theodore
Attorneys for Respondent,
Bodega Latina Corporation d/b/a El Super